

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

75-7424

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

VINCENT K. HILTON and EDWARD G. HILTON, as Trustees under
Indenture dated May 9, 1958 for the benefit of VINCENT K.
HILTON; VINCENT K. HILTON and EDWARD G. HILTON, as Trustees
under Indenture dated May 9, 1958 for the benefit of MARY G.
HILTON; and EDWARD G. HILTON,

Plaintiffs-Appellants,

against

BROWN BROTHERS HARRIMAN & CO., et al.,

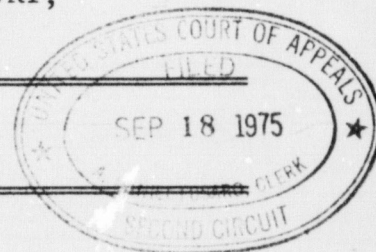
Defendants,

FIRST NATIONAL CITY BANK,

Defendant-Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

APPENDIX



JOHN M. FRIEDMAN
Attorney for Plaintiffs-Appellants
2 Overhill Road
Scarsdale, N. Y. 10583

LUNNEY & CROCCO
Attorneys for Defendant-Appellee
20 Exchange Place
New York, N. Y. 10005

(4975A)

PAGINATION AS IN ORIGINAL COPY

APPENDIX

List of parts of the record contained

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RELEVANT DOCKET ENTRIES

Jan. 5, 1972 Filed complaint. Issued summons.

Feb. 10, 1972 Filed summons and marshals return. Served First
National City Bank on 1/28/72.

Feb. 17, 1972 Filed answer of First National City Bank to
complaint.

May 23, 1972 Filed amended complaint.

June 14, 1972 Filed answer of First National City Bank to
amended complaint.

July 28, 1972 Filed Memo Endorsed on Order to Show Cause
filed 7-19-72 [to amend complaint] "Motion Granted -
So Ordered. Frankel J."

June 19, 1975 Filed stipulation as to facts between pltffs. and
deft. First National City Bank.
Filed Opinion # 42033 - Findings and Conclusions.

July 3, 1975 Filed Judgment # 75,588.

July 17, 1975 Filed pltff. notice of appeal.
Filed bond for undertaking on appeal in amount
of \$250.00.

July 24, 1975 Filed Bill of Costs as taxed in the sum of \$486.97
in favor of deft. First National City Bank as against
all pltffs, and added to Judgment # 75,588.

RELEVANT PORTIONS OF AMENDED COMPLAINT

Caption

Plaintiffs, by John M. Friedman, their attorney, for their complaint allege:

General Allegations of Jurisdiction

1. All of the counts are founded on diversity of citizenship and amount (and certain of the counts are also founded on the existence of Federal questions arising under particular statutes and amount in controversy, as stated in paragraph 2). Plaintiffs are citizens of the State of Ohio.

Brown Brothers Harriman & Co. (BBH) * * *.

Bacon, Stevenson & Co. (Bacon) * * *.

First National City Bank (FNCB) is a national banking organization, located in and a citizen of the State of New York.

Inter-Mundis Capital Services Limited (Inter Mundis)

* * *.

James S. Bush (Bush) * * * .

The matter in controversy in each count exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

* * *

Allegations of Fact Applicable to Counts

Thirteenth through Twenty-Seventh

28. Prior to March 12, 1971, BBH had been holding the

following stocks as custodian for the trustees of the said trust for the benefit of Vincent K. Hilton:

500 shares of Midland Ross Corp.

445 shares of Protinal C.A., whose value on said date was \$9,923.50

29. Prior to March 12, 1971, BBH had been holding the following stocks as custodian for the trustees of the said trust for the benefit of Mary G. Hilton:

500 shares of Midland Ross Corp.

225 shares of Protinal C.A., whose value on said date was \$5,017.50

30. On May 29, 1969, the trustees of each trust were Bush, Vincent K. Hilton and Mary G. Hilton. On April 7, 1971, Bush was replaced as trustee by Edward G. Hilton. On February 1, 1972, Mary G. Hilton died. Edward G. Hilton is a beneficiary of each trust.

31. On March 12, 1971, BBH on instructions of Bush, transferred all of said shares to Bacon for the accounts of the respective trusts.

32. On said date, Bacon delivered all of the said shares of Protinal C.A., which were inscribed in the name of BBH to Bush, and Bacon effected the sale of said shares of Midland Ross Corp. upon the New York Stock Exchange, with a settlement date of

March 17, 1971, but immediately on March 12, 1971 delivered 2 checks for \$15,072.98 each to Bush representing the net proceeds of said sales.

33. Said transfers, delivery and sale were accomplished by use of a means or instrumentality of interstate commerce, or of the mails, or in whole or part of the facility of a national securities exchange.

34. The said 2 checks were drawn by Bacon upon FNCB, one for \$15,072.98 to the order of "James S. Bush, et al u/t/a 5/9/58 F/B/O Vincent K. Hilton", the other for \$15,072.98 to the order of "James S. Bush et al Trustee u/t/a 5/9/58 Mary Grimes Hilton", and were each endorsed by Bush as follows: "Deposit to acc't of Inter Mundis Capital Services Ltd. James S. Bush, Trustee", and then deposited in the account of Inter Mundis Capital Services Ltd. with FNCB.

35. FNCB has paid the amounts of said checks to Inter Mundis or at its order and debited the account of Bacon in said amounts.

36. Bush has wrongfully misappropriated all of said shares, proceeds and payments, and has disappeared. The transfers, delivery and sale of said shares, and said deposit, payments and debiting were unauthorized and improper, and were aided and abetted by BBH, Bacon, FNCB and Inter Mundis.

37. As a result of said transfers and misappropriation (which words here and hereafter include said delivery, sale, deposit, payments and debiting), plaintiffs have not received any of said shares or proceeds of sale.

* * *

Twenty-Sixth Count (against FNCB)

The conduct of FNCB described in paragraphs 34, 35, 36 and 37 constituted a conversion of said monies which belong to plaintiffs.

Twenty-Seventh Count (against FNCB)

57. FNCB owes plaintiffs the amounts of said checks for money had and received from Bacon on March 12, 1971, to be paid by FNCB to plaintiffs.

WHEREFORE, plaintiffs demand judgment in favor of the said trustees for the benefit of Vincent K. Hilton * * * against * * * FNCB * * * on Counts Thirteenth through Twenty-Seventh for the sum with interest, of \$24,996.48 plus an attorney's fee of \$8,500.00 plus punitive damages of \$12,500.00 plus costs, and plaintiffs demand judgment in favor of the said trustees for the benefit of Mary G. Hilton against * * * FNCB * * * on Counts Thirteenth through Twenty-Seventh for the sum, with interest of \$20,090.43 plus an attorney's fee of \$7,500.00 plus punitive damages of \$10,000.00 plus costs.

(Subscription)

RELEVANT PORTIONS OF ANSWER OF FIRST NATIONAL CITY BANK

Caption

Defendant First National City Bank ("Citibank") answers the amended complaint against it as follows:

1. It has no knowledge nor information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 1 thereof, except that Citibank is a national banking organization located in, and a citizen of, the State of New York.

2. It has no knowledge nor information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 2 thereof, except it denies so much of said paragraph as refers to Citibank.

3. It has no knowledge nor information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs 28, 29, 30, 31, 32, 33, 34, 35 and 39 thereof, except that, upon information and belief, checks as described in paragraph 34 thereof were so endorsed and were paid by Citibank and debited to the account of the drawer, and the proceeds thereof deposited into the account of Inter Mundis Capital Services Ltd. ("Inter Mundis") maintained with Citibank.

4. It has no knowledge nor information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

and 50 thereof, except that it denies so much of said paragraphs as refers to Citibank.

5. It denies, upon information and belief, each and every allegation contained in paragraphs 56 and 57 thereof.

* * *

HEREFORE, Citibank demands judgment dismissing the amended complaint against it; or, in the event that any party herein recovers judgment against Citibank as a result of its actions with respect to either or both of said checks, then Citibank demands judgment against defendants Bacon, Bush and Inter Mundis in a like sum, together with the costs and disbursements of this action.

(Subscription)

STIPULATION AS TO FACTS

Caption

IT IS HEREBY STIPULATED AND AGREED between plaintiffs and defendant First National City Bank (Citibank) as follows:

1. This action shall be tried, as between plaintiffs and Citibank, by the Court without a jury upon the facts hereinafter set forth, and any additional proof called for by the Court. Plaintiffs would testify to, or introduce into evidence documents to show, the facts set forth in paragraphs 2 through 13 below; Citibank does not contest the truth of said facts for the purposes of this action, and has no proof to the contrary. Citibank would testify to, or introduce into evidence documents to show, the facts set forth in paragraphs 14 through 17 below; plaintiffs do not contest the truth of said facts for the purposes of this action, and have no proof to the contrary.

2. Plaintiffs are citizens of Ohio; Citibank is a national banking organization, located in and a citizen of New York; the matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00.

3. On March 12, 1971, there was in existence a trust set up by will dated May 9, 1958, by and for the benefit of Vincent K. Hilton (VKH Trust), of which Vincent K. Hilton, Mary

G. Hilton and James S. Bush (Bush) were trustees.

4. On March 12, 1971, there was in existence a trust set up by Indenture dated May 9, 1958, by and for the benefit of Mary G. Hilton (MGH Trust), of which Vincent K. Hilton, Mary G. Hilton and James S. Bush (Bush) were trustees.

5. At the time this action was commenced, on January 5, 1972, Bush had ceased to be trustee of each trust and Edward G. Hilton had been appointed as trustee of each trust; thereafter, Mary G. Hilton died, and the trustees of each trust now are Vincent K. Hilton and Edward G. Hilton, as stated in the caption, said trusts are plaintiffs herein.

6. By amendment dated September 15, 1965, which was in effect on March 12, 1971, Bush was authorized by the then trustees of each said trust " * * * to act alone as Trustee, as aforesaid, and to exercise the powers vested in the Trustees without obtaining the concurrence of any one or more of the Trustees at any time acting under said trust agreement * * *."

7. On March 12, 1971, each of said trusts owned 500 shares of Midland Ross Corporation, which were sold on that date through the New York Stock Exchange by Bacon, Stevenson & Co., a stockbroker, at the direction of Bush; on that date two checks were given by Bacon, Stevenson & Co. to Bush for the net proceeds of said sales, each check for \$15,072.98, check #3359 for the VKH

Trust and check #3360 for the MGH Trust; copies of said checks are annexed hereto and made a part hereof as Exhibits A and B respectively.

8. On March 12, 1971, said checks were endorsed by Bush, as appears thereon, and were deposited by him in an account of Inter-Mundis Capital Services Limited (Inter Mundis) at Citibank; Citibank debited the account of Bacon, Stevenson & Co. with the amount of the checks, and credited the account of Inter Mundis therewith.

9. Inter Mundis was then a corporation organized under the law of the Bahamas, of which Bush was then president.

10. There was no indebtedness or other amount owing from the trusts to Inter Mundis, Inter Mundis was not entitled to the funds represented by said checks, or the checks, and said endorsements and deposits were not authorized.

11. Bush disappeared shortly after March 12, 1971, and his whereabouts are unknown.

12. No funds from the said Inter Mundis account with Citibank were disbursed to said trusts.

13. Said trusts have not received any part of the funds represented by said checks, or the proceeds of said sales, except as the result of settlement of claims against others, for which credit will be given should the Court hold that plaintiffs are

entitled to recover from Citibank herein.

14. Prior to the institution of this action, Citibank had no knowledge of the existence of said trusts, and had no copies of, and had not seen any of the instruments which created said trusts, or amended the terms thereof.

15. Citibank has no records or other proof indicating that any inquiry was made by it when the checks in question were deposited.

16. Inter Mundis has disbursed all funds in said account which is overdrawn in the amount of \$395.47; Citibank has no copies of its monthly statements of the Inter Mundis account and therefore cannot locate in its files copies of the checks or other documents by which said funds were disbursed on or after March 12, 1971; however no payments were made from said account to Citibank, including but not limited to purchase of travelers checks or payment on any charge account.

17. On March 12, 1971, Inter Mundis was indebted to Citibank on a loan, in the amount of \$30,000.00. On February 28, 1972, the Inter Mundis indebtedness was reduced by \$1350.56, but Citibank is unable to ascertain how such reduction was accomplished. Citibank holds 20,000 shares of Wright Hargreaves Mines Limited as security for the Inter Mundis indebtedness.

18. On March 12, 1971, Bush was indebted to Citibank in

the amount of \$2,500.00, which is still owed. Bush had maintained two accounts with Citibank which are overdrawn in the amount of \$949.96.

19. Citibank does not owe anything to either Inter Mundis or Bush, and has no assets of either except as stated above.

20. The only financial statements or credit reports relating to Inter Mundis or Bush which Citibank has in its files are a Dun & Bradstreet report and a balance sheet, copies of which are attached hereto and made a part hereof as Exhibits C and D.

Dated: January 2, 1975.

John M. Friedman

Attorney for Plaintiffs

Lunney, & Crocco

by Charles A. Crocco

A Partner

Attorneys for Defendant First

National City Bank

BACON, STEVENSON & CO.
TWENTY-FIVE BROAD STREET NEW YORK, N. Y. 10004

3359

MAR 12 1971

1-8
210 1/8

AY TO THE
ORDER OF

James S. Bush ET AL *10741 51915 F/Bk Trust K. Kipton* *\$15072 and 98 cts*
BACON, STEVENSON & CO. *\$15072 and 98 cts* DOLLARS

FIRST NATIONAL CITY BANK

55 WALL STREET
NEW YORK, N. Y. 10005

James S. Bush
R. Carson

⑆0210⑈0008⑆ 09253135⑈

⑈0001507298⑈

LES 001

Exhibit A

- A 14 -

AR 12 11 4 0 2 9 27 44

*Deposit to acct of
Lester Muncie Capital
Services Ltd.
James S. Bush Trustee*

BACON, STEVENSON & CO.
TWENTY-FIVE BROAD STREET NEW YORK, N. Y. 10004

3360

MAR 12 1918

1-8
210 198

Y TO THE
ORDER OF

James S. Bush, Trustee of Trust for Mary Emma Hutton

\$15072.28 98 cts

DOLLARS

FIRST NATIONAL CITY BANK

55 WALL STREET
NEW YORK, N. Y. 10005

R. C. Cawson

002100008 09253135

00001507298

Exhibit B

- A 15 -

*Deposit in
Inter Municipal Capital
Sources Ltd
James S. Bush, Trustee*

10 MAR 1918

AR 12714009 2743

D-U-N-S

DATE OF REPORT

STARTED

RATING

OR 1 OCT 30 1967 N

INTER-MUNDIS CAPITAL SERVICES LTD. INVESTORS

1967

N Q

80 BROAD ST (ROOM 1906)
NEW YORK N Y 10004
TEL 212 422-2440

SUMMARY

PAYMENTS
RECORD

UNDETERMINED
CLEAR

JAMES SMITH BUSH, PRES
WILLIAM Mc P. CHRISTIE, SEC
DIRECTORS: The Officers & Curtis J. Sittenfeld,
Chm of Bd & Carlos P. Amar

PAYMENTS

Due to the nature of operations, subject does not seek general commercial credit. Incidentals are purchased locally on a cash or close to cash basis.

FINANCE

On Oct 27 1967, James Smith Bush, President, stated that due to the newness of operations, all financial information would be deferred to a later date.

BANKING

Account maintained at local bank since Sept 1967. Non-borrowing, satisfactory balances. Principal stated out of town banking facilities also maintained.

HISTORY

Incorporated Nassau, Bahamas, on Oct 1 1967, authorized capital \$300,000 300,000 shares common stock issued at par value \$1 per share. Bush further stated that a large portion of the stock is owned by National Filter Corporation, James Smith Bush, and Carlos P. Amar. No one person holds majority.

BUSH, born 1901, divorced from first wife, married. Graduated 1922 from Yale with B.A. Degree. Served United States Air Force. 1959 through 1963 director of the Export-Import Bank of Washington. 1963 through 1967 President of Northwest International Bank, New York N.Y. At present time residing as a Director and consultant of Northwest International Bank.

CHRISTIE, former div of American Embassy in Nassau, Bahamas, with family residing in Nassau. Antecedents not learned.

SITTENFELD, President of National Filter Corporation, Mt Vernon N.Y. Born approximately 1921, married.

AMAR, President of Bankamer, Madrid, Spain.

OPERATION

Subject raises capital for exporters, export transactions, on a world-wide basis. Capital is also raised for factories and new businesses. Will act as a U.S. representative for Government of Developing countries, also as U.S. representative for foreign corporations. Income derived on an annual fee basis. LOCATION: At present, rents 200 square feet on the 19th floor of this multi story office structure located downtown financial section of Manhattan in good repair.

Principal stated that subject will move to suite 2200, caption address occupying 1,500 square feet. That move is intended to take place Jan 1 1968.
10-30 (554 69) T2 6B46

(EXHIBIT C)*

RECEIVED
JAN 11 1968
NEW YORK
REMANENT

INTER MUNDIS CAPITAL SERVICES, Ltd.

STATEMENT as of DECEMBER 19, 1967

ASSETS

Current

| | |
|------------------|-------------|
| Cash in Bank | \$34,000.00 |
| Promissory Notes | 14,300.00 |
| Notes Receivable | 7,000.00 |
| | <hr/> |
| | 55,300.00 |

Fixed

| | |
|------------------|-------------|
| Furniture, etc. | 9,000.00 |
| Office equipment | 1,000.00 |
| | <hr/> |
| | \$10,000.00 |
| | <hr/> |
| | \$65,300.00 |

LIABILITIES

Current

| | |
|---------------|-------------|
| Bills Payable | \$ 5,500.00 |
| Due Exporters | 27,000.00 |
| | <hr/> |
| | 32,500.00 |

Paid in Capital 30,000.00

Earned Surplus 2,800.00

\$32,800.00

\$65,300.00

(EXHIBIT D)*

James S. Bush

FINDINGS AND CONCLUSIONS

Caption

FRANKEL, D.J.

By stipulation dated January 2, 1975, the parties have agreed upon the facts from which plaintiffs claim defendant First National City Bank is liable to them in the amount of \$83,586.91. The facts so stipulated are incorporated herein as the court's findings. Upon the facts thus determined, plaintiffs' claim against said bank should and will be dismissed.

Applying the law of New York, which is agreed to govern the case, the court finds no basis for plaintiffs' claim. As an original proposition, it is scarcely appealing to urge that the settlor-beneficiaries, having delegated to the malefactor the power to act for them and having shed even minimal responsibility to look out for themselves, should be made whole by a bank, lacking knowledge even of the trusts' existence, for the routine honoring of its customer's checks. In any event, though there be no case squarely in point, the authorities reviewed in the briefs reflect principles defeating plaintiffs' claim. There was no such duty of inquiry as plaintiffs propose. The signature of Bush, fully authorized, was ample to negotiate the checks. Had the bank asked about that, it would have learned only that the course it took was proper.

A final judgment should be settled on notice (1) dismissing plaintiffs' claim against First National City Bank, with costs to the latter, and (2) awarding plaintiffs judgment on default against Inter Mundis.

Dated, New York, New York

June 19, 1975

MARVIN E. FRANKEL

U.S.D.J.

JUDGMENT

Caption

This action came on for trial before the Court, Hon Marvin E. Frankel, District Judge, presiding; and the action having been submitted upon an agreed statement of facts as between plaintiffs and defendant First National City Bank, and the Findings and Conclusions of the Court having been duly rendered; and defendant Inter-Mundis Capital Services Limited having been duly served and having defaulted in pleading or otherwise defending herein as provided by F.R.Civ.P; and the Court hereby certifying its express determination that there is no just reason for delay and its express direction for the entry of this final judgment as hereinafter specified as between plaintiffs and said defendants;

It is Ordered and Adjudged:

1. That plaintiffs' claim against defendant First National City Bank be dismissed and that the Clerk tax costs in favor of defendant First National City Bank and against plaintiffs Vincent K. Hilton and Edward G. Hilton, as Trustees under Indenture dated May 9, 1958 for the benefit of Vincent K. Hilton, Vincent K. Hilton and Edward G. Hilton, as Trustees under indenture dated May 9, 1958 for the benefit of Mary G. Hilton, and Edward G. Hilton, and that said defendant have execution therefore.

2. That plaintiffs Vincent K. Hilton and Edward G.

Hilton, as Trustees under Indenture dated May 9, 1958 for the benefit of Vincent A. Hilton, Vincent K. Hilton and Edward C. Hilton as Trustees under Indenture dated May 9, 1958 for the benefit of Mary G. Hilton, and Edward G. Hilton recover of defendant Inter-Mundis Capital Services Limited \$211,295.96 with interest at 6% per annum of \$109,340.83, a total of \$320,636.79, and that the Clerk tax costs in favor of said plaintiffs and against said defendant, and that said plaintiffs have execution therefor. Dated at New York, New York, this July 2nd, 1975.

Marvin E. Frankel

United States District Judge

Judgment Entered 7/7/75

Raymond F. Burghardt

Clerk

Parties entitled to notice, pursuant to Civil Rule 12:

Plaintiffs: John M. Friedman 2 Overhill Road Scarsdale, N.Y. 10583

Defendant, First National City Bank: Lunney, Downey & Crocco

20 Exchange Place New York, N.Y. 10005

7/24/75 - Bill of Costs as taxed in the sum of \$486.97 in favor of

Defendant First National City Bank, as against plaintiffs, and

added to the judgment.

Raymond F. Burghardt

Clerk

NOTICE OF APPEAL

Caption

Notice is hereby given that Vincent K. Hilton and Edward G. Hilton, as Trustees under Indenture dated May 9, 1958 for the benefit of Vincent K. Hilton, Vincent K. Hilton and Edward G. Hilton, as Trustees under Indenture dated May 9, 1958 for the benefit of Mary G. Hilton, and Edward G. Hilton, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment dated July 2nd, 1975 and entered in this action on the 7th day of July, 1975.

July 17, 1975.

John M. Friedman

John M. Friedman

Attorney for Plaintiffs Vincent K. Hilton and Edward G. Hilton, as Trustees under Indenture dated May 9, 1958 for the benefit of Vincent K. Hilton, Vincent K. Hilton and Edward G. Hilton, as Trustees under Indenture dated May 9, 1958 for the benefit of Mary G. Hilton, and Edward G. Hilton

Address: 2 Overhill Road Scarsdale, N.Y. 10583

Tel. # 914-725-0960

COPY RECEIVED

1 copy

SEP 18 1975

LUNNEY & CROCCO

ATTORNEYS FOR _____

Received ~~3~~ copies of the within

this _____ day of _____, 19____.

Sign _____

For: _____ Esq(s).

Att'ys for _____

